

The LEGAL MONITOR

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A newsletter published by Zimbabwe Lawyers for Human Rights for members & human rights defenders



11 October 2010

Edition 66

COST-FREE

Biti takes on police

HARARE-Movement for Democratic Change (MDC) Secretary-General Tendai Biti's appeal challenging his prolonged detention on terrorism charges in 2008 will be heard by the Supreme Court next week, in a case which exposes the ill treatment regularly meted out to human rights defenders by police, as well as the slow pace of the justice delivery system, in Zimbabwe.

Biti, the country's Finance Minister in a coalition government of bitter rivals President Robert Mugabe and Prime Minister Morgan Tsvangirai, will have his case heard by a Full Bench sitting as a Constitutional Court on Monday next week in which he wants his prolonged detention declared unlawful.

The treason case stemmed from a document police said was authored on 25 March 2008 allegedly linking Biti to illegal change of government plans. Further charges of communicating or publishing falsehoods emanated from Biti's announcement that his party leader Tsvangirai had defeated President Mugabe in an election held in March 2008.

Official results later showed that Tsvangirai had indeed defeated President Mugabe in the poll, but lacked a clear majority needed to avoid a runoff election.

Both charges were withdrawn in February 2009 in what many saw as a political compromise meant to smoothen the process of the MDC agreeing to a coalition government.

Yet Biti's lawyers, Honey and Blanckenberg, will on 18 October appear before the Supreme Court in a matter seeking to overturn a High Court ruling made on 18 June 2008 which declared that Biti's prolonged detention was lawful.

Following an urgent application by Biti's lawyers on 17 June 2008 to challenge the legality of his continued detention for five court-sitting days without being brought before the courts, High Court Judge Justice Samuel Kudya ruled that the police actions in refusing to release him or bring him to court were legal.

Boysen Matema and Crispin Makedenge - the two top police officers regularly linked with the arrest and harassment of rights and political activists - had detained and quizzed Biti on his election pronouncements.

His lawyers filed a Notice of Appeal against Justice Kudya's ruling more than two years ago on 10 July 2008. Assistant Commissioner Matema



Tendai Biti: MDC Secretary General

and Chief Superintendent Makedenge are cited as First and Second Respondents in Biti's appeal.

The Supreme Court's consideration of, and judgment on, the case - only being heard now - will therefore be academic.

It however serves to highlight the slow nature of Zimbabwe's justice delivery system, and how authorities can potentially escape liability for abuses of fundamental rights because cases take too long to be heard and finalised.

Matema and Makedenge arrested and detained Biti on 12 June 2008, 10 days before Tsvangirai pulled out of the 27 June 2008 presidential election runoff citing gross violence and abuses against his supporters, officials and civil society activists. African leaders rejected the runoff, in which President Mugabe insisted on running as a sole contestant, resulting in the negotiated coalition government.

The warrant used by the two policemen was obtained on 6 June 2008 and authorised them to arrest Biti "immediately upon sight" and bring

him before the courts on suspected terrorism and communicating falsehoods charges.

Read part of the warrant used by Matema and Makedenge: "These are, therefore, in the State's name to command you that immediately upon sight hereof you apprehend and bring the said person or cause him to be apprehended and brought before the court of a Magistrate to be examined and to answer to the said information, and to be further dealt with according to the law."

Justice Kudya ruled that the word "immediately" on the warrant only served to direct the police to arrest Biti instantly upon sight.

"A reading of the command in the warrant places emphasis on the immediacy of the arrest on sight of the applicant only. The word immediately does not govern the arraignment of the applicant at court," ruled Justice Kudya.

Biti's lawyers, Sarudzayi Njerere and Lewis Uriri argue that Matema and Makedenge were obliged by section 34 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] to take Biti to the



Sarudzayi Njerere

place specifically mentioned in the warrant, adding that the warrant, on the face of it, directed that Biti be brought "immediately" before a Magistrate.

"Even if it held that the warrant authorised detention for so long as was reasonable in the circumstances (i.e., even if a reasonable time were to be in excess of 48 hours), five court days was not a reasonable time. Five court days is twice the period of detention allowed in cases of arrest without warrant.

"Where the arrest is made with a warrant, a reasonable period of detention should, if at all different, be shorter than that in cases of arrest with warrant, because by the time sworn information as to the suspect's guilt is available, investigations would surely be advanced or even nearing completion.

"Even if the detention was impliedly authorised by the warrant, such detention could not have lawfully exceeded 48 hours. The appeal must therefore succeed with cost," stated Uriri in his heads of argument.



Unlawful dismissal of students from schools, a violation of the Right to Education

Zimbabwe Lawyers for Human Rights (ZLHR) is concerned by reports of school children who have been turned away from school for non-payment of fees during the opening of the 2nd Term.

In The Herald edition of 9 September 2010, the Minister of Education, Sport, Arts and Culture is reported to have expressed concern over the “lawlessness in the education sector” which had seen the illegal turning away of students from school for non-payment of fees.

The Minister is said to have highlighted the need to amend legislation on education with regards to the charging and payment of levies, fees and incentives to deal with the misdemeanours being perpetrated by schools in this regard. ZLHR understands legislation regulating fees as making provision for a “general purpose fund” and tuition fees.

The Education Act gives power to the Secretary for Education to fix the fees payable to the general purpose fund in any government school and allows the Secretary to fix different fees for different government schools.

Tuition fees must also be approved by the Minister. “School fees” may also include a “levy” charged by the School Development Association in respect of the building of the school concerned. However, non-payment of the levy does not warrant refusal of admission.

While it is common practice that the term “school fees” is being interpreted in schools to include amounts being demanded from students to top-up the salaries of existing teachers, non-payment of such amounts is not a legal basis to refuse admission to a pupil.

A headmaster, subject to the directions of the Secretary, may only refuse to admit to school any pupil in respect of whom any fees, whether tuition

fees or general purpose fees, have not been paid.

If the amounts which schools are charging are not in respect of the general purpose fund or, where they are, but are not approved by the Secretary for Education, then school authorities have no power to bar a child from attending school if such amount is not paid.

It is therefore important that invoices issued by school authorities for “school fees” should give a full and detailed breakdown as to how the total amount is made up. Parents should be entitled to indicate how the payments which they make are to be apportioned.

ZLHR calls upon the Ministry of Education to take immediate and decisive measures, including its proposed amendment to current legislation, to ensure that the “lawlessness in the education sector”-which the Ministry has itself identified-does not continue to prejudice the right to education of children.

As the Minister of Education Senator David Coltart correctly outlined in The Herald report of 9 September 2010, the right to education “is a human right and Zimbabwe signed the International Convention on the Rights of the Child”.

ZLHR, as part of its public interest litigation initiative is looking into any possible legal action to guarantee the rights of those children being affected by the “lawlessness in the education sector”, especially that pertaining to non-payment of “fees”.

Parents with affected children are free to approach ZLHR for any legal services to be provided in the public interest.

Issued by ZLHR in the public interest

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ZLHR takes over activist battle

HARARE-Lawyers representing constitutional reform activist Madock Chivasa have given an ultimatum to the University of Zimbabwe (UZ) to release the results of the former student leader.

UZ authorities last Tuesday withheld the academic results of Chivasa, the National Constitutional Assembly (NCA) spokesperson, who sat for his final year Bachelor of Arts examinations in this year August when he visited the institution to collect his results.

The authorities advised the NCA spokesperson to report to the university’s chief security officer identified only as Tarambiwa claiming that there were issues he needed to clear with the security.

After complying with the instruction the security personnel later advised Chivasa that the case was now being handled by the UZ Vice-Chancellor Levi Nyagura.

In a letter written to the Registrar of the UZ, Chivasa’s lawyer, Jeremiah Bamu of Zimbabwe Lawyers for Human Rights (ZLHR), indicated that the influential rights group would resort to legal action if the university authorities fail to provide a reasonable timeframe outlining when the constitutional reform activist should collect his academic results.

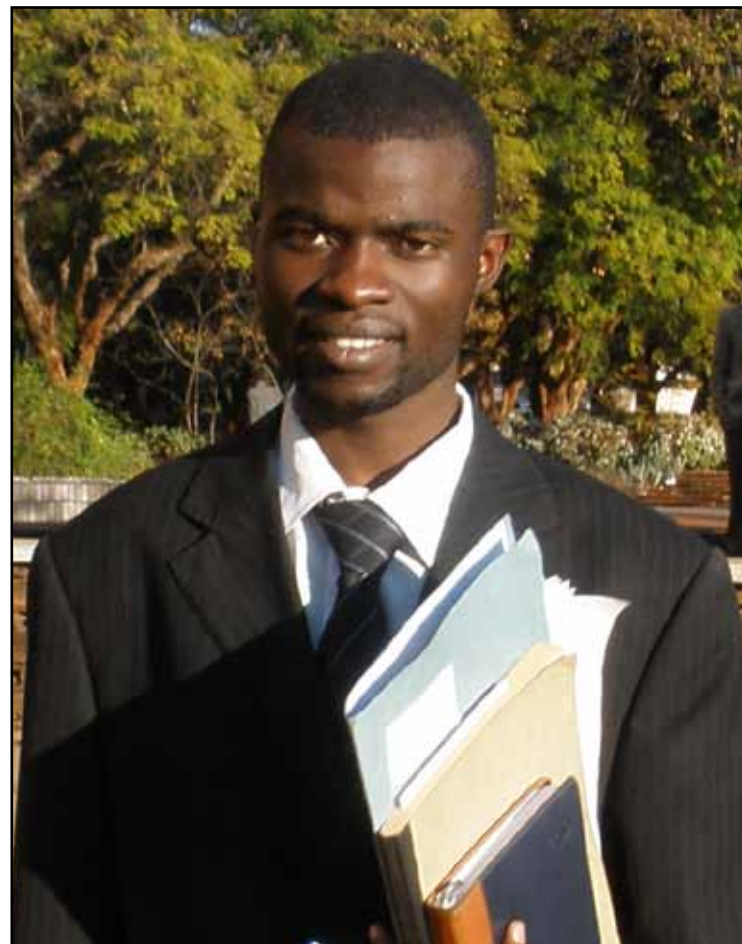
“He (Chivasa) has no outstanding obligation to the University of Zimbabwe known to him. He has gone through all the processes required to ascertain as such. His examination results are now being withheld from him without any just or lawful excuse being given in spite of him not owing anything to the University of Zimbabwe.



Madock Chivasa

Kindly clarify to us in writing why this should be so. You will no doubt appreciate the need for our client to access his academic results expeditiously,” read part of Bamu’s letter to the UZ Registrar.

The human rights lawyer added: “We believe this is a matter capable of amicable settlement. In this



Jeremiah Bamu: Chivasa’s lawyer

respect, we anticipate your favourable response, together with an indication of when our client can come to uplift his results, within the next three days. Should we not hear from you within that period we shall take it to mean that you are not inclined to settling matters amicably, in which event, we shall take all lawful steps to protect our

client’s rights and interests without further notice to yourselves.”

Chivasa, a former student leader was reinstated at the UZ last year after serving an eight-year suspension on allegations of leading unrest on the campus.

ZLHR petitions Chombo over evictions

HARARE-Lawyers representing some residents of Hatcliffe Extension have petitioned the Ministry of Local Government, Rural and Urban Development to halt the pending evictions of the residents for failing to pay exorbitant high lease fees.

Officials from the Ministry of Local Government, Rural and Urban Development, which is headed by Ignatius Chombo posted notices at Hatcliffe Extension in June compelling all leaseholders to pay for the renewal of their agreements by end of last month.

Chombo's ministry warned that failure to pay would result in the residents losing their housing stands which would then be allocated to other residents on the housing list.

"We wish to notify all those who have not renewed their expired leases to do so before 30th September 2010. Valid leaseholders should also settle all arrears within the same period. Those who fail to do so shall have their stands repossessed and allocated to applicants on our waiting list, as we shall assume that they are no longer interested in their stands," reads part of the notice signed by an official only identified as Makwinja.

The under-privileged residents said the ministry's officials did not consult them on the lease fees and renewal process.

In a letter written by the residents' lawyer Rangu Nyamurundira of the Zimbabwe Lawyers

for Human Rights (ZLHR) said the notice by Chombo's ministry was illegal.

"We believe that such a notice by the Ministry of Local Government which threatens to summarily evict our clients as from the 30th of September 2010 without any due process will be illegal. Further, and with respect, we note that the circumstances surrounding our clients' residency at the stands subject to the lease agreements is surrounded by a lack of good faith and abuse of its authority by the Ministry of Local Government," reads part of Nyamurundira's letter.

Chombo's ministry first allocated the stands in Hatcliffe Extension to the less privileged residents as early as 2002 subject to lease agreements to the effect that the lease holders would be given title over the stands by 2009.

During the infamous Operation Murambatsvina of May 2005 the Ministry of Local Government, Rural and Urban Development and the City of Harare caused the demolition of the residents' homes and their forced eviction from the very stands that had been allocated to them.

Ironically, the ministry's notice of 4 June 2010 acknowledges the very lease agreements it had ignored during Operation Murambatsvina when the same ministry caused the forced eviction of the residents under the claim that they were illegal settlers.

Chombo's ministry allowed the residents back onto the stands after the infamous Operation

Murambatsvina and proceeded to continue receiving rentals as per the lease agreements. The residents who have been fulfilling the terms of the lease agreements were only disrupted from doing so by the actions of the Ministry which saw their forced eviction and ruining of their livelihood and sources of income.

Nyamurundira said had the residents not been forcefully evicted, nor had their homes and livelihoods destroyed, they were most likely able to erect buildings on the housing stands in terms of the lease agreements and had title given to them by 2009.

"In 2009, after the Zimbabwean dollar was replaced by foreign currencies, our clients made several attempts to seek the new annual rent they would be expected to pay. The Ministry of Local Government however failed to advise our clients on what new amounts, in foreign currency they should pay for the annual rent. Because of your ministry's failure to advise our clients of the new rentals in foreign currency our clients were not able to pay any rent during 2009. It was only on the 4th of June 2010 that our clients received a response from the Ministry of Local Government. The response, far from clarifying the new rent and offering any terms of payment to the lease holders whom the ministry had failed to advise within a reasonable period, was in the form of the pending threat of eviction," Nyamurundira wrote in his letter.

The human rights lawyer asked Chombo's ministry to furnish the residents with a written

guarantee of their commitment to refrain from and cease any unlawful and forced eviction. He said failure to provide such a written guarantee would compel ZLHR to seek legal remedies against the ministry's intended evictions.

The pending evictions have also been condemned by Amnesty International, which urged the Zimbabwean authorities to guarantee the residents' right to shelter.

"Residents of Hatcliffe Extension are among the poorest and most marginalised in Zimbabwean society and many households have no means of paying the lease renewal fee, especially as a lump sum," said Michelle Kagari, Amnesty International's Deputy Director for Africa.

"Instead of threatening vulnerable people with eviction, the government must provide protection from the cycle of insecurity and further violations by providing security of tenure and affordable payment plans for leases."

Hatcliffe Extension is one of a number of settlements set up under Operation Garikai or Restore Order by President Robert Mugabe's previous government programme to resettle hundreds of people left without a roof over their heads after Operation Murambatsvina.

But only a small number of displaced people were resettled while the majority of people were forced into overcrowded existing housing stock while others were forcibly relocated to rural areas.

Torture compensation case on

HARARE- High Court Judge Ben Hlatshwayo will this Friday hear a case in which Emmanuel Chinanzvavana, a multiple victim of state brutality, is demanding US\$1, 2 billion in damages for the abduction and torture he suffered at the hands of State agents in 2008.

Chinanzvavana is demanding the damages from four cabinet ministers and eight top police, intelligence and prison commanders whom he says were responsible for State security agents who abducted him on 3 November and kept him incommunicado until 23 December 2008 when "defendants then conspired as they had been doing all along to detain Plaintiff at Avondale Police Station".

He says he was tortured during this period as State agents sought to force him into admitting to sabotage and banditry accusations. Police only brought Chinanzvavana to court on 29 December.

Chinanzvavana was part of a group of rights and political activists abducted, tortured and charged with banditry in 2008 when State agents clamped down on activists and ordinary people perceived to be anti President Robert Mugabe.

Last week Charles Kwaramba, a member of Zimbabwe Lawyers for Human Rights who is representing Chinanzvavana, told

The Legal Monitor that Justice Hlatshwayo was forced to postpone the matter because Farai Mutamangira, who is representing the defendants, failed to turn up at the court without giving reasons on 1 October when a pre-trial conference was scheduled.

Chinanzvavana has cited ministers Kembo Mohadi (home affairs), Giles Mutsekwa, housing and social amenities minister who was a co-home affairs minister with Mohadi when the abduction and torture happened, Patrick Chinamasa (justice and legal affairs) and Didymus Mutasa, (minister for presidential affairs).

Police commissioner-general Augustine Chihuri, commissioner of prisons Paradzai Zimondi, central intelligence organisation (CIO) director-general Happyton Bonyongwe, CIO assistant director Ashley Walter Tapfumaneyi, police chief superintendents Crispen Makedenge and Magwenzi, police assistant commissioner Nyathi and detective chief inspector Mpfu are cited as the other defendants in the compensation claim.

Chinanzvavana states that State security agents, with the active assistance, or in connivance with police abducted him on 3 November 2008. He was taken to Harare Central Police Station for questioning by officers from the law and order section before being taken to an unknown location where he was denied basic human rights such as access to lawyers, access to medication,



Emmanuel Chinanzvavana



Charles Kwaramba

access to family, friends and relatives among other rights protected by the Constitution and international instruments which Zimbabwe is party to.

"During the same period, Plaintiff was subjected to assaults, torture, and other cruel, inhumane and degrading treatment at the hands of captors, who include and/or were acting in concert or in connivance with one or more of the defendants, either directly or indirectly through their agents/subordinates," reads part of Chinanzvavana's claim.

He has broken down the claim as follows:

- payment in the sum of US\$500 000 as damages for unlawful abduction, enforced disappearance, unlawful detention incommunicado, unlawful arrest and unlawful deprivation of liberty
- payment of US\$100 000 being damages for assault
- payment of US\$300 000 being damages for torture, pain, shock, suffering and psychological trauma, contumelia and loss of amenities of life and payment of another US\$300 000 being damages for malicious prosecution.

POSA: All eyes on MP Gonese

HARARE- The historic Public Order and Security Amendment Bill is now expected to go to the Committee Stage this week after Zanu PF MPs reportedly indicated that they wanted to propose some modifications.

The Bill was brought to the House of Assembly as a private member's Bill by MDC-T Chief Whip Innocent Gonese to tame the draconian Public Order and Security Act (Posa), which has been used by the previous government to suppress opposition and activists.

Last week on Tuesday MPs from both Zanu PF and MDC agreed that there was need to amend POSA so that 'freedoms of assembly and speech as well as other freedoms were not trampled upon.'

The Bill could not go through the Committee Stage on Wednesday as expected.

"We had to hold it as there are some amendments which Zanu PF would want to propose before it goes to the Committee Stage," said Hon. Gonese in an interview with *The Legal Monitor*.

Some of the changes the Bill is proposing are to prevent prosecution of people who organise gatherings without police clearance and provide for appeals to the magistrates courts if gatherings are banned. Currently, appeals are only made to the High Court.

POSA is a repressive law enacted in 2002 out of the colonial Law and Order (Maintenance) Act (Loma). Loma was crafted by the Ian Smith regime in the 1960s



MDC-T Chief Whip Innocent Gonese

to suppress freedom of expression, movement and opposition politics by African nationalist.

The stance by Zanu PF MPs to support the Bill took many by surprise because they had expected

fierce opposition on the proposed amendments.

Gonese said he was hoping that by this Tuesday when the House of Assembly resumes sitting Zanu PF's proposals would have been released.

"Any reasonable suggestions will be tolerated. As long as there is no destruction to the thrust of the amendments, no one will not take the amendments on board," said the Mutare Central MP, who has made history in Zimbabwe by becoming the first one to bring a Private Member Bill to Parliament. In all cases so far it has been cabinet ministers.

"I am hoping the Bill will sail through by consensus so that it does not have hiccups in the Senate," added Gonese.

After the Zanu PF amendments have been effected, the Bill will go through the Committee Stage where it would be scrutinised on every clause.

After that it goes for Third Reading before it goes to the Senate.

Activists say Posa has been a tool used by the Zanu PF government to suppress freedom of speech and association by Zimbabweans.

Members of Gonese's MDC party, including its leader now Prime Minister Morgan Tsvangirai, have been victims of the colonial law.

The civil society, workers leaders and students have not been spared, either as they were arbitrarily arrested and detained.

In most cases they have been released without trial. So far there are a small amount of cases where those few who have been taken to court have been convicted.

SA workers, civil society in anti-xenophobia campaign

JOHANNESBURG-South Africa's largest labour federation has begun a campaign to root out xenophobia in workplaces amid fears that failure by political leaders to put tangible measures to deal with the problem could result in repeated attacks targeting foreigners.

The Congress of South African Trade Unions (COSATU) said the initiative followed a realisation that root causes of xenophobia—failure by Pretoria to improve its citizens welfare six years after the end of apartheid and political and socio-economic problems in neighbouring countries—remained unattended.

Broader civil society, workers, exiles activists, professionals, researchers, community networks and international organisations are part of the campaign, launched after a COSATU/UNHCR convened public seminar against xenophobia in Johannesburg at the end of last month.

"Migrants and foreign nationals as human beings are equally entitled to all the rights and responsibilities to which all people are entitled as enshrined in the constitution of the country and the Universal declaration of human rights," said COSATU in a statement announcing the

initiative, which will help migrant workers fight for and defend their rights.

The initiative will push for the transformation of the justice system to cater for special needs of foreigners, build local community structures to unite workers and communities against discrimination, particularly xenophobia.

Zanele Matebula, the COSATU deputy international relations secretary said members of the initiative will create community dialogue forums to share experiences on each other's background and history, organise meetings to discuss and confront xenophobia in our communities and build popular consciousness against xenophobia, racism and sexism through workers education programmes.

The initiative partners will support the self-organisation and integration of migrant workers to effectively bargain for their rights and create an atmosphere of welcome in all our activities and organization, push for a review of Pretoria's immigration dispensation for it to be progressive, humane and caring to people from outside the country, particularly Africans, who are worst victims of such occurrences.



South African President Jacob Zuma

"Unless xenophobia is treated as a matter of national urgency and priority, there shall be persisting tensions and even regular outbreaks of such occurrences. In this regard, we call for Xenophobia Monitoring system, that will include a hotline or call centre where incidents or even indicators can be reported before they become major occurrences," said Matebula.

Political parties, Matebula said, should put xenophobia as one of the critical issues in their campaign manifestos and to ensure that

councillors in forthcoming local government elections commit to take decisive action against those involved in fermenting tensions against foreigners in communities.

"We remain concerned by the lack of decisive leadership, ready and willing to acknowledge the magnitude of the problem and confront it. In some instances, political leaders and councillors ride on populist rhetoric that uses the scapegoat of foreigners to justify their failure to provide services to local communities. In this way, they remain fraudulently popular, whilst fermenting divisions and diversions from the real issues affecting communities. In this regard, certain elements within the law enforcement agencies and authorities have also contributed in the way they have positioned themselves on these sensitive issues," said Matebula.

Xenophobic attacks targeting mainly Zimbabweans and Mozambicans killed over 60 people in 2008 when cases that started in Johannesburg's poor townships spread across the country. Fears of more attacks have been high since then, particularly after reports of sporadic xenophobic attacks after the soccer world cup hosted by South Africa in June this year.